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IN THE

Supreme Court of the United States

October Term, 196

No. [redacted]

MANDALINE E. THOMPSON,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Supreme Court—State Library Building
Richmond 19, Virginia

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IN THE

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October Term, 1961

No. 655

MANDALINE E. THOMPSON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

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"In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity or legislation is now too

much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court, should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

FRANKFURTER, J. concurring
American Fed. of Labor v.
American Sash & Door Co.,
335 U.S. 538, 555-557

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated March 1, 1962, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above mentioned communication, written by the Clerk at the direc-

* Post, Appendix A.

tion of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On February 23, 1961, petitioner was convicted in the Juvenile and Domestic Relations Court of the City of Lynchburg for violation of Section 18.1-173 of the Code of Virginia (1950), as amended. She was sentenced to jail for a period of thirty days. Upon appeal to the Corporation Court of the City of Lynchburg, petitioner was again convicted and a similar sentence was imposed on April 6, 1961. A petition for writ of error to the judgment of the Corporation Court was denied by the Supreme Court of Appeals of Virginia on October 12, 1961, and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on January 10, 1962.

STATEMENT OF FACTS

On February 13, 1961, petitioner and five other members of the Negro race entered the premises of the Patterson Drug Store in Lynchburg, Virginia, and attempted to obtain service therein at eating facilities reserved for white patrons. (R. 2,6,11-12). Because of their race, all members of this group were refused service at these facilities and were asked to leave the premises. (R. 3,6-7,14). This request was made by the Vice-President and General Manager of the Patterson Drug Co., Inc., the private corporation which owns and operates the Patterson Drug Store, after that official had introduced himself to the members of the group and explained his position with the company. (R. 3,5-7). Petitioner refused to leave the premises, although she was advised by a police officer who had been summoned

to the scene that she would be arrested if she did not do so. (R. 3,7-8). When petitioner persisted in her refusal, she was arrested for trespassing in violation of Section 18.1-173 of the Virginia Code. (R. 3,8).

THE STATUTE

Under attack in the instant case is Section 18.1-173 of the Code of Virginia (1950) as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.
>
> "This section shall not be construed to affect in any way the provisions of §§29-165 to 29-170."

QUESTION PRESENTED

Does Section 18.1-173 of the Virginia Code, as applied to petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Section 18.1-173 of the Virginia Code, as Applied to Appellant in the Case at Bar, Does Not Contravene the Fourteenth Amendment to the Constitution of the United States.

Section 18.1-173 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934.

Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments, the language of the instant statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. ***The statute does not purport to be, and is not, a racial segregation law.*** It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome.

That the enactment in question is not a racial segregation law and has no racial connotation is conclusively established by the decision of this Court in *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369, *app. dism.* 335 U. S. 875, *reh. den.* 335 U. S. 912. In that case the Court held that the statute, as applied to a member of the sect of Jehovah's Witnesses who refused to leave the premises of a private building after proper warning, was not violative of the right to freedom of speech, press, assembly or worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 12 and 16 of the Constitution of Virginia. Commenting upon the effect of the statute, the Court observed (188 Va. at 76-77):

> "The language of the statute is clear and unambiguous. Its provisions may be invoked only when a person has unlawfully entered or has remained upon the premises after he has been forbidden so to do by one lawfully in charge or in possession. . . . The only purpose of this law is to protect the rights of the owners or those in lawful control of private property.
>
> * * *

> "We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

Equally manifest is it that invocation of the statute under the circumstances of the case at bar impairs no constitutional right of the petitioner. The record undeniably demonstrates that the petitioner was not arrested because of her race or color, but solely because she refused to leave the premises of a privately owned and operated drug store when requested to leave and persisted in remaining upon such premises after having been forbidden to do so.

Under such circumstances, resort by a private individual or corporation to the protection of a statute imposing criminal sanctions for continued trespass upon private property after proper warning presents no question whatever of conflict with the Fourteenth Amendment. Within the past five years the argument advanced by petitioner in the case at bar has been urged in various jurisdictions and uniformly rejected. See: *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. (2d) 295; *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. (2d) 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, *aff'd. per curiam* 4 Cir., 284 F. (2d) 746; *Griffin* v. *Collins*, 187 F. Supp. 149; *State* v. *Avent*, 253 N.C. 580, 118 S.E. (2d) 47; *Drews* v. *Maryland*, 224 Md. 186, 167 A (2d) 341; *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E. (2d) 817; *Griffin* v. *Maryland*, 225 Md. 442, 171 A (2d) 717; *Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423. Observations of the various judicial tribunals in certain of these cases are sufficiently significant to merit reproduction in the body of this brief.

In *State* v. *Clyburn, supra*, the Supreme Court of North Carolina—in a situation identical to that under consideration in the case at bar—sustained the conviction of a Negro who

had been charged with unlawfully entering upon the lands of another after having been forbidden to do so and unlawfully refusing to leave that portion of the premises reserved for members of the opposite race. In that case, the defendant and other Negroes had entered the business premises of certain proprietors who were engaged in retailing ice cream and sandwiches and who operated their facility on a racially segregated basis.

Pointing out that North Carolina law imposed criminal penalties for interfering with the possession or right of possession of real estate privately held, that the possessor might accept or refuse whomsoever he pleased and for whatever whim suited his fancy and that race conferred no prerogative upon the intruder nor impaired his defense, the Supreme Court of North Carolina declared (101 S.E.(2d) at 299):

> ". . . the Supreme Court of the United States said in Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L.Ed. 1161, 3 A.L.R. 2d 441: 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*' This interpretation has not been modified: Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; District of Columbia v. Thompson Co., 346 U.S. 100, 73 S. Ct. 1007, 97 L.Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d 302, certiorari denied; Dargan v. Yellow Cab Co., 346 U.S. 840, 74 S. Ct. 52, 98 L.Ed. 361.
>
> * * *
>
> *"The right of an operator of a private enterprise to select the clientele he will serve and to make such selec-*

tion based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 269 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160; Terrell Wells Swimming Pool v. Rodriguez Tex. Civ. App., 182 S.E. 2d 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589, 24 L.R.A., N.S., 447; Younger v. Judah, 111 Mo. 303, 19 S.W. 1109; Goff v. Savage, 122 Wash. 194, 210 P.374; De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N.E. 2d 574; Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N.E. 2d 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S.E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." (Italics supplied.)

In *Williams* v. *Howard Johnson's Restaurant, supra,* a Negro who had been denied service in a Howard Johnson's Restaurant located in Alexandria, Virginia, because of his race instituted suit for a declaratory judgment and injunctive relief, contending that his exclusion from the restaurant in question upon racial grounds violated rights secured to him by the Constitution and laws of the United States. Sustaining the dismissal of petitioner's complaint by the United States District Court for the Eastern District of Virginia as being "in accord with the decisions of the Supreme Court of the United States and other Federal courts", Judge Soper—speaking for the United States Court of Appeals for the Fourth Circuit—observed (268 F. (2d), at 847):

"The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restau-

rants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasises the long established local custom of excluding Negroes from public restaurants and he contends that the acquiesence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unless these actions are performed in ovedience to some positive provision of State law they do not furnish a basis for the pending complaint.

* * *

"The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842, 92 L. Ed. 1161:

"'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3; 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the*

> *States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" (Italics supplied.)

Griffin v. *Collins, supra,* involved a class action for injunctive relief to prevent the arrest for trespass of Negroes who might visit the Glen Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator. Plaintiffs were Negroes who had been arrested, or threatened with arrest, for trespass upon the premises of the privately owned and operated amusement park. They sought an adjudication declaring that the acts of the owner and operator of the amusement park "in utilizing governmental authority and powers of the State and the sanctions of State law to aid, support and enforce the denial to plaintiffs, solely because of their race, of admission to Glen Echo Park and enjoyment of its facilities" violated plaintiff's rights under the Constitution of the United States. *Griffin* v. *Collins, supra* at 152.

Holding that the arrest of Negro trespassers by police officers of the State of Maryland—in response to the request of an amusement park proprietor for police assistance in enforcing such proprietor's policy of excluding Negroes—did not constitute State action in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Court observed (187 F. Supp. at 153-154):

> "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 1947, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. Cf. Dawson v. Mayor & City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 350 U. S. 877, 76 S. Ct. 133, 100 L. Ed. 774

"Plaintiffs concede the right of the corporate defendants, as owners and operators of Glen Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants, like other property owners or operators of a private business, may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, *that if the proprietor of a business calls a police officer,* deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity and (2) deprive the Negro of his rights under 42 U.S.C.A. §§ 1981 and 1983.

"Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." (Italics supplied.)

In *Henderson* v. *Trailway Bus Company, supra,* plaintiffs sought to enjoin the enforcement of Section 18.1-173 of the Virginia Code (the very enactment challenged in the instant case) upon the ground that the statute, as applied to "sit-in" demonstrations, was violative of the Fourteenth Amendment to the Constitution of the United States. Rejecting this contention and dismissing the complaint, the three-judge District Court (Boreman, Circuit

Judge, and Lewis and Bryan, District Judges) observed (194 F. Supp. at 426):

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law', meaning property not at the time affected with a public interest. *Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 1959, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System*, 4 Cir., 1960, 284 F. 2d 746. *Assurance of this right is the entire and sole aim of the two code provisions before us. Hall* v. *Commonwealth, supra*, 188 Va. 72, 49 S. E. 2d 369, 371. In there sustaining the statute the Virginia Court relied in part upon *Martin* v. *City of Struthers*, 319 U.S. 141, 147, 63 S. Ct. 862, 865, 87 L. Ed. 1313, where Justice Black said:
>
> > 'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. * * *' "
> > (Italics supplied.)

So far as counsel for the Commonwealth are aware, there has been no decision—State or Federal—at variance with the views expressed in the above mentioned cases. In light of these decisions, the Commonwealth submits that the constitutional validity of the Virginia statute under attack in the case at bar has been so thoroughly well settled by such a unanimity of judicial opinion that no really serious assertion of antagonism to the Fourteenth Amendment can be

made. In this connection, certain fundamental similarities shared by these decisions are immediately apparent. Initially, it should be noted that each of these cases was decided the same way, and each decision was rendered by a unanimous court. *Not one dissenting judicial voice is heard.* Obviously, none of the tribunals in question experienced any difficulty in ascertaining the applicable law governing the case before it, and none hesitated to declare the rights of the parties in accordance with that law. Moreover, in each of these cases, decisions of the Supreme Court of the United States were relied upon to establish the central constitutional principle involved, i.e., that the Fourteenth Amendment to the Constitution of the United States has nothing whatever to do with the racially selective practices of private individuals and does not prohibit invocation of State enforced trespass statutes to protect individuals exercising their right to discriminate. Of particular significance is the fact that the individual court considering each of these cases stressed the decision of the United States Supreme Court in *Shelley* v. *Kraemer,* 334 U. S. 1, as supportive of its disposition of the case before it in a manner diametrically opposed to the contention of appellant in the case at bar.

Clearly this Court has settled beyond question for more than three-quarters of a century that the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the States, that the Fourteenth Amendment erects no shield against merely private conduct and that actions carried out by the people of a State in accordance with their own desires or social practices do not constitute actions of the State. *Civil Rights Cases,* 109 U. S. 3; *Shelley* v. *Kraemer, supra.* Counsel for the Commonwealth respectfully submit, therefore, that the case at bar does not even present a judicial—much less a substantial federal —question.

CONCLUSION

For the foregoing reasons counsel for the Commonwealth submit that Section 18.1-173 of the Virginia Code, as applied to the petitioner in the case at bar, presents no question whatever of conflict with the Fourteenth Amendment to the Constitution of the United States and that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Supreme Court–State Library Building
Richmond 19, Virginia.

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

March 1, 1962

THE HONORABLE ROBERT Y. BUTTON
Attorney General of Virginia
Richmond, Virginia

RE: THOMPSON v. VIRGINIA
No. 655, October Term, 1961

Dear Sir:

A petition for writ of certiorari was filed in the above-entitled case on January 10, 1962.

I have been directed by the Court to request that you file a response to such petition. Your response should be printed and 40 copies, with service, should reach this office on or before March 31, 1962.

Very truly yours,

JOHN F. DAVIS, *Clerk*

By E. P. CULLINAN *S/*

E. P. CULLINAN
Chief Deputy

EPC: jmh